Attachment C – Supplemental Sewer Overflows in the Combined Sewer System Comments

These supplemental comments address: (i) the proposed definition of sewer overflows from the combined sewer system (SOCSS) in Attachment A – Definitions to the Tentative Order; (ii) the proposed mechanisms in the Tentative Order in Paragraph VI.C.5(a)(viii)(b) associated with monitoring and reporting SOCSS; and (iii) the discussion about SOCSS reporting in the draft Fact Sheet at Section VI.C.5.a.

As a starting point, the SFPUC recognizes that the Regional Water Board and EPA have an interest in including SOCSS monitoring and reporting terms in the final Oceanside permit. The SFPUC emphasizes, subject to these comments, that it is prepared to work with the agencies to develop a workable framework for the monitoring and reporting of SOCSS. Broadly stated, the SFPUC is committed to developing a monitoring and reporting program for SOCSS that: (i) reports SOCSS associated with operation, maintenance, or other combined sewer system failures; and (ii) uploads reportable data to the California Integrated Water Quality System. The SOCSS monitoring and reporting terms needs to be clearly laid out in the permit (as opposed to incorporated by reference) and those terms must be developed with specific consideration of the nature of the SFPUC's system (i.e., a combined sewer system as opposed to a sanitary sewer system). Further, a reasonable approach to SOCSS reporting will not impose a burdensome and unnecessary requirement to collect and report events resulting solely from storm events that exceed the combined sewer system's level of service.

For the reasons summarized here, the proposed terms addressing SOCSS in the Tentative Order are unworkable, ambiguous, inconsistent with applicable law, confusing and rely upon an inapplicable technical and legal framework by erroneously incorporating terms developed and solely applicable to sanitary sewer systems.

Specific Comments

The definition of SOCSS on page A-5 must be revised to exclude SOCSS occurring as a result of storms exceeding the system's level of service. By definition, as a result of the inherent nature of a combined sewer system, SOCSS may occur when the design capacity of the system is exceeded by a storm event. There is no material benefit in collecting data on these occurrences because it is known in advance that they will occur. To the extent that there is a reasonable need to evaluate the performance of the combined system during events in excess of the design criteria, this can be reasonably accomplished via modeling and other engineering evaluation. The burden of doing so would be substantially less than monitoring and reporting these events (which can be widespread during exceptional storm events) and would provide data of equivalent or better value. The requested revision can be incorporated into the permit text with the following edit:

> … Sewer overflows from the combined sewer system do not include releases due to: **(i)** failures in privately-owned sewer laterals, **(ii) overflows resulting solely from storm events in excess of the system's design capacity where the system is otherwise operating as designed,** or **(iii)** authorized combined sewer

discharges at Discharge Point Nos. CSD-001, CSD-002, CSD-003, CSD-004, CSD-005, CSD-006, or CSD-007.

The SFPUC provides the following comments associated with proposed reporting mechanism in the Tentative Order in Paragraph VI.C.5(a)(viii)(b):

1. The proposed reporting mechanism for SOCSS incorporates by reference the sanitary sewer overflow notification and reporting requirements of State Water Board Order No. 2006-0003-DWQ (Order 2006-0003) and any amendments thereto. This is not reasonable. Order 2006-0003 is specifically designed to address overflows from sanitary sewer systems. In fact, Order 2006-0003 was specifically adopted by the State Water Board to meet its obligation to take action pursuant to Water Code section 13193 (2001, A.B. 285). *See Fact Sheet* at https://www.waterboards.ca.gov/water_issues/programs/sso/docs/fs_wqo20130058.pdf). In adopting this section of the Water Code in 2001, the California legislature specifically directed the State Water Board to "develop a uniform overflow event report form to be used for reporting of sanitary sewer system overflows ..." Water Code 13193(b); AB 285 (2001) (requiring "the state board, ... in consultation with specified entities, to develop report forms for spills or overflows from a sanitary sewer system."). Had the legislature intended the resulting regulations to apply to combined sewer systems, it would have so stated. It did not. And, as a result, none of the reporting or monitoring requirements specified in Water Code 13193(b), and incorporated into Order 2006-0003, are applicable to combined sewer systems and the legislature has not authorized the State Water Board to impose those requirements on a combined sewer system. To the extent that a monitoring and reporting system for SOCSS is going to be required, it must be based upon a reasonable technical analysis of the operations relevant to a combined sewer system and cannot reasonably rely upon an order adopted pursuant to a legislative directive to regulate sanitary sewer systems.

2. Combined sewer systems are distinct from sanitary sewer systems and require separate regulatory schemes recognizing the technical differences. This is uniformly recognized by sewer systems nationwide and accepted by regulatory agencies, including by EPA, which regulate sanitary systems separate from combined sewer systems. See, e.g., https://www3.epa.gov/region1/sso/ ("A combined sewer overflow or CSO is different from an SSO"); EPA's Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688 (April 19, 1994). It is, therefore, arbitrary to impose requirements on a combined sewer system that were specifically prepared for and adopted to regulate a sanitary system.

3. The terminology used in Order 2006-0003 is entirely inapplicable to a combined sewer system. For example, the Order: (i) does not define combined sewer overflow; (ii) does not define a combined sewer system; (iii) specifically relates to the regulation of untreated or partially treated wastewater which is defined as "waste discharged from the sanitary sewer system" and is different in kind and nature than the flow in a combined sewer system during storm events. As a result, incorporating the Order (and any amendments thereto) by reference results in ambiguity and a lack of fair notice to San Francisco because the terminology cannot be directly applied to the SFPUC's combined

sewer system and it is unclear how the governments intend to apply the requirements in Order 2006-0003 to a distinct and separate system.

4. San Francisco has been denied reasonable notice and opportunity to comment on, challenge, or influence the terms in Order 2006-0003 (or any existing amendments thereto incorporated into the Tentative Order). This is because the SFPUC had no reasonable notice that a reporting requirement designed for sanitary systems would be, over a decade in the future, applied to its combined sewer system. In fact, the legislature recognized the importance of having the State Water Board work cooperatively with the regulated community to develop Order 2006-0003, but the consulted community naturally consisted of only sanitary sewer systems. *See* Water Code 13193(b) ("the state board, in consultation with representatives of cities, counties, cities and counties, special districts, public interest groups, the State Department of Public Health, and the regional boards shall develop a uniform overflow event report form to be used for reporting of sanitary sewer system overflows"). Because the regulated community involved in consultation with the State Water Board during adoption of Order 2006-0003 consisted of sanitary sewer systems, which are different in kind and nature, their consultation with the State Water Board and participation in the public comment process cannot be deemed to address San Francisco's unique position as the operator of a combined sewer system. Similarly, applying the legislatively mandated reporting requirements for sanitary sewer systems to San Francisco's combined system nearly two decades after adoption of Water Code 13193 arbitrarily and capriciously deprives San Francisco of the protections otherwise afforded to the regulated community by the legislature in mandating that the State Water Board adopt a sanitary sewer overflow reporting requirement. *See, e.g.,* AB 285 (2001) (providing that "... if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions...").

5. It is inappropriate to seek to incorporate, by reference, future amendments to Order 2006-0003 into the Oceanside Permit. Incorporation by reference of unknown future terms into the permit do not provide the SFPUC an adequate opportunity to comment on all applicable requirements of the permit in advance of its finalization because the terms in the permit can be modified in the future by separate regulatory action. This also causes an unacceptable delegation from EPA to the Regional Water Board because the Regional Water Board can effectively amend this Oceanside Permit unilaterally by amending Order 2006-0003 whereas, due to the nature of discharges from the permitted system, EPA has concurrent authority over the permit. *See, e.g.,* Tentative Order at Section II. ("This Order is also issued pursuant to federal Clean Water Act (CWA) section 402 and implementing regulations adopted by U.S. EPA and ..."). As a result, any future amendment of the permit adopted solely by the State Water Board's amendment of Order 2006-0003 would be contrary to the requirements of the Clean Water Act and its implementing regulations that require public notice and comment. It would also run afoul of the NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board, which requires that EPA have an opportunity to comment upon or object to the issuance of a

permit or the terms or conditions therein. All of these concerns are amplified here because Order 2006-003 is, on its face, only applicable to sanitary sewer systems. In fact, in adopting and amending Order 2006-003, the legislature has mandated that the requirements be tailored to sanitary sewer systems. Therefore, not only are the requirements inapplicable to a combined system – as discussed above – but the State Water Board does not have the authority to make changes to an order adopted to implement Water Code 13193, including future amendments to Order 2006-003, to accommodate the distinct engineering and other technical issues associated with a combined sewer system.

Finally, the SFPUC objects to the unqualified characterization in Section VI.C.5.a. of the Fact Sheet that regulators have a need to collect information about SOCSS to "establish whether sewer overflows from the combined sewer system result in a nuisance as defined by Water Code Section 13050" in the fact sheet. As discussed above, there is only a reasonable basis to collect information about SOCSS that result from operation, maintenance, and other system failures. There is no reasonable need or basis to collect information about SOCSS that occur solely due to storm events in excess of the SFPUC's level of service and associated design capacity. Any overflows from the combined system that occur due to storm events in excess of design capacity cannot be, under state law, a nuisance for a number of reasons, including that San Francisco is authorized to operate a combined sewer system, operation of that system is pursuant to a permit issued by regulatory agencies, operation of a combined sewer system is not objectively unreasonable, and San Francisco is further protected by design immunity granted pursuant to the California Government Code. The fact sheet needs to be amended to recognize that any collection of information about SOCSS is limited to events resulting from a system failure or other operation and/or maintenance issue and not due to storm events in excess of design capacity.